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Summary record of the 659th meeting
Held at the Vienna International Centre, Vienna, on Wednesday, 26 May 1999, at 9.30 a.m.

Chairman: Mr. Renger ..... (Germany)

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Privately financed infrastructure projects (*continued*)

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The meeting was called to order at 9.45 a.m.

Privately financed infrastructure projects (*continued*) (A/CN.9/458 and Add.1-9)

Chapter VI. End of project term, extension and termination (*continued*) (A/CN.9/458/Add.7)

General suggestions concerning the drafting of chapter VI (*continued*)

1. **Mr. Lortie** (Observer for Canada), expanding on the suggestion he had made at the previous meeting, said that his delegation considered that the notes on the legislative recommendations were well balanced. There was a general principle and various exceptions to that principle in each case. His delegation's suggestion was that the recommendations should begin in each case with the general principle and then list the exceptions. That approach could be adopted not only with recommendation 2 but also with recommendations 1, 3 and 4.

2. **Ms. Nikanjam** (Islamic Republic of Iran) endorsed that suggestion, saying that it would result in a balanced text.

3. **Mr. Lalliot** (France), supported by **Mr. Mazini** (Observer for Morocco), welcomed the Canadian suggestion. The Secretariat should be left to find the appropriate wording for the chapeau of the recommendation in each case.

4. **The Chairman** said he took it that the Commission wished to adopt the Canadian suggestion.

5. **Mr. Wiwen-Nilsson** (Observer for Sweden) said that, at the previous meeting, the Secretariat had requested an indication of how delegations saw the different consequences of different kinds of termination of the project agreement, and he would like to respond.

6. There were five possible reasons for a premature termination: impeding events; acts of the contracting authority and other governmental agencies; termination for convenience by the contracting authority; breach by the contracting authority; and breach by the concessionaire. Termination following impeding events related only to events for which the concessionaire had not assumed the risk. In such a case, the compensation paid to the concessionaire would correspond to the investment made, unless already recovered by project revenues (including any subsidy received from the contracting authority, etc.), plus costs entailed by termination. That would include the outstanding debt and equity, but not lost profits.

7. In cases of termination due to acts of the contracting authority or other government agencies, the compensation payable would be similar but might in some cases also include compensation for lost profits.

8. In cases of termination for convenience and termination due to breach by the contracting authority, the compensation would again be similar but would include lost profits.

9. In cases of termination due to breach by the concessionaire, the lenders would have to accept the risk and there would in principle be no payment, except that the contracting authority would pay the residual value of the assets, taking into account investment not recovered from project revenues, unless the contracting authority could demonstrate that the assets had a lower market value. There might also be claims for damages by the contracting authority against the concessionaire although it might not be realistic to expect that a company specially established to implement the project would have the means to honour such claims.

10. In the case of normal expiry of the project agreement, all assets needed for the continuous operation of the service should be returned to the contracting authority free of charge, except for assets that had not been foreseen in the concessionaire's initial investment estimate but which the concessionaire had been required to build or acquire pursuant to subsequent requests by the contracting authority.

11. **Mr. Estrella Faria** (International Trade Law Branch) thanked the observer for Sweden for his very detailed analysis. However, he recalled that the Commission had been urged not to be too prescriptive on what the standards of compensation should be in the various situations, as some of the points were debatable. He suggested that the Secretariat should incorporate the points made by the observer for Sweden as an explanation of the practice in some countries but not as recommendations.

12. **Mr. Mazilu** (Romania) endorsed that suggestion.

13. **The Chairman** said that he took it that the suggestion had the approval of the Commission.

14. **Mr. Maradiaga** (Honduras) said that the word "*rescisión*" used in the Spanish version of the draft guide as the equivalent of "termination" raised problems for his

country. In the translation of the expression "termination for convenience", for example, "*terminación*" would be a more appropriate term.

15. **Mr. Wallace** (United States of America) asked the observer for Sweden why he felt that the treatment of lost profits in the case of termination due to acts of the contracting authority or the Government should be different from their treatment in the case of termination for convenience or breach by the contracting authority.

16. **Mr. Lalliot** (France) wondered whether the recommended procedure in the case of impeding events was not tantamount to making the contracting authority bear the whole risk for *force majeure* situations.

17. Like the United States representative, he did not fully understand the distinction made between the second, third and fourth kinds of termination mentioned.

18. In the case of normal expiry of the agreement, he considered, with all due respect, that the presentation in the draft guide was clearer than in the Swedish analysis.

19. **Mr. Darcy** (United Kingdom) said that the Commission might be interested to hear that, because of a policy change, the United Kingdom had just terminated a large concession project for reasons of convenience of the contracting authority. He would inform the Secretariat of the compensation details, which might be a good practical example for the guide.

20. **Mr. Gill** (India) said that the Swedish proposal did not appear to strike a balance. It seemed to give a greater burden to the contracting authority in regard to compensation, making it more attractive to the concessionaire, who could apparently retain subsidies. Some clarification was needed.

21. **Mr. Wiwen-Nilsson** (Observer for Sweden), replying to the last point, said that what he had meant was that any subsidy received would be subtracted in calculating the value of the investment made for purposes of compensation. That would benefit the contracting authority rather than the concessionaire.

22. In reply to the questions of the United States and French representatives on the reason for the distinction in the treatment of termination for acts of the contracting authority, termination for convenience and breach by the contracting authority, he said that acts of the contracting authority or, in particular, other government agencies, such as revoking or refusing a permit, were different from an actual breach of the agreement. Termination for convenience and breach by the contracting authority should certainly justify compensation for lost profits.

23. With regard to "impeding events", whether the risk was absorbed by the concessionaire would depend on the agreed allocation of risks. He was not speaking of a general *force majeure* clause.

24. **The Chairman** said that those explanations would be noted.

Chapter VII. Governing law (A/CN.9/458/Add.8)

25. **Mr. Estella Faria** (International Trade Law Branch) said that while sections A and B of draft chapter VII were new, but the substance of sections C and D had been contained in an earlier version of draft chapter I on general legislative considerations on which the Commission had had an extensive discussion at its thirty-first session (see document A/53/17, paras. 63-95). The discussion of other areas of law relevant to privately financed infrastructure projects had now been considerably expanded.

General remarks, and the law governing the project agreement (legislative recommendation 1 and paras. 4 and 5)

26. **Mr. Lalliot** (France) said that chapter VII was too ambitious and went into too much detail in some places, for instance on guarantees, though not enough in others, for instance on labour law. The meaning of the title was unclear, at least in French. Privately financed infrastructure projects were complex and were governed by the full range of the host country's laws, which it would be quite impossible for the guide to address in exhaustive fashion. Some of the points developed, while interesting, were rather less well balanced than in other parts of the guide.

27. Legislative recommendation 1 seemed to be more declaratory than operational. Probably no government could indicate which out of thousands of legislative provisions were applicable to privately financed infrastructure projects.

28. Paragraphs 3 and 4 of the notes seemed to give a mainly precautionary message. However, he was unhappy with the penultimate sentence of paragraph 4 if it implied that rules derived from jurisprudence, for example, were not mandatory. Perhaps the text should say that the applicable law in some legal systems was not necessarily written law and not necessarily contained in laws and regulations, but could derive from other sources of law such as jurisprudence.

29. **Mr. Wallace** (United States of America) congratulated the Secretariat on the work it had done. He partly shared the French representative's views on recommendation 1; however, he also noted the lack of any reference to private international law or choice of law.

30. After paragraph 2 of the notes it might be advisable to include a new paragraph drawing attention to chapter VIII on settlement of disputes.

31. He suggested that in the fourth sentence of paragraph 4 the words "those dealing with" should be added before the words "environmental protection measures".

32. With regard to paragraph 5, not only would it be difficult to list all the laws directly applicable to publicly financed infrastructure projects but it was just conceivable that a concessionaire might argue that it should not have to accept liability under a law that had not been listed. It should therefore be made clear that the list was not exhaustive. In fact, it might be better to deal with the subject in a brochure.

33. **Mr. Darcy** (United Kingdom) agreed that the chapter was over-ambitious. He was not sure why the subject of governing law had been given its own chapter; other matters, such as regulatory issues, might have been more worthy of one.

34. The notes represented a fairly good discussion of the issues involved, but the content should be shortened and reincorporated in chapter I.

35. **Ms. Gioia** (Italy) agreed with what had been said. It would be impracticable for a legislative provision to give an exhaustive list of statutory or regulatory texts governing the project agreement. She also agreed that the chapter was too ambitious.

36. **Mr. Choukri Sbaï** (Morocco) said that the chapter was one of the most important in the guide but that its title was inappropriate. He suggested that it might be amended to read "Law governing the risks of the project".

37. In connection with the third sentence of paragraph 4, which stated that "in some countries the project agreement may be subject to administrative law, while in others the project agreement may be governed by private law", he said that the project would often be subject to both administrative and private law.

The meeting was suspended at 11 a.m. and resumed at 11.30 a.m.

38. **Mr. Gill** (India) asked whether recommendations 1 and 2 meant that the application of the law of the land could be excluded, and that lenders and insurers, for example, would be able to give the concessionaire immunity from local law. The interests of the developing countries needed to be protected.

39. **Mr. Phua Wee Chuan** (Singapore) agreed that chapter VII was too ambitious and its title misleading, since it did not deal with governing law in the contractual sense but rather with the domestic legal provisions applicable to the project agreement. He endorsed the view that it would be enough to put a summary of the chapter in chapter I. He saw little value in the first part of recommendation 1, since all statutory texts of the host country would apply to the project agreement. Moreover, before entering into a project agreement, a concessionaire or lender would in practice obtain the legal opinion of a private lawyer in the host country on the legal provisions applicable.

40. With regard to the second part of the recommendation, there would be some merit in adopting provisions identifying statutory texts that were not applicable. For instance, to attract investors the host country might exclude the application of a certain tax law.

41. **Mr. Lortie** (Observer for Canada) suggested that recommendation 1 should be amended to read: "The host country may wish to stipulate that the law governing the project agreement be, unless otherwise provided, the law of the host country."

42. **Ms. Nikanjam** (Islamic Republic of Iran) said that the chapter contained useful suggestions that could apply to all legal systems. In her delegation's view, the Commission should adopt the general principle that the law governing the project agreement was the law of the host country. She knew of cases where concessionaires had tried to make acceptance of a foreign country's law as the governing law a condition for concluding a project agreement. Her delegation would be against placing the provisions of the chapter elsewhere.

43. **Mr. Wallace** (United States of America) said that, to the extent that the title of the chapter was misleading, it should be changed. He did not agree that the chapter should be shortened, since without its detail legislators would be misled about the amount of work needed, which might well include reforming many areas of law. It was essential to have a favourable investment climate and the 12 areas listed, and perhaps others, were very important.

44. With regard to recommendation 1, Governments had great leverage and should not underestimate their ability

to resist investors who wished to have total freedom in their choice of law.

45. The Canadian suggestion was acceptable to him.

46. **Mr. Mazilu** (Romania) said that if chapter VII was retained as a separate chapter, it would need another title, to clarify its purpose.

47. **Mr. Morán Bovio** (Spain) said that chapter VII was necessary and should not be combined with other chapters. The structure was appropriate for a legal guide focusing on the practical matters that needed to be taken into account in drafting contracts. There was no need for many adjustments to the draft chapter and the title was an appropriate expression of the chapter's contents—namely, the laws that would govern privately financed infrastructure projects.

48. **Mr. Phua Wee Chuan** (Singapore) said that it was a fact that government lawyers would never suggest the use of a governing law other than that of the host country. However, the Commission's practice was to recognize freedom of contract. The Secretariat could perhaps find wording that would strike a balance between the two approaches.

49. **Mr. Wiwen-Nilsson** (Observer for Sweden) said that what was meant by governing law in the first instance was the law governing the contractual relationship between the parties. On most other matters, the law of the host country would apply. The text of the chapter was generally satisfactory, but the reference to environmental protection measures and health and labour conditions in the fifth sentence of paragraph 4 of the notes was out of place in the part of the notes dealing with the law governing the project agreement.

50. **Mr. Lalliot** (France) supported the Canadian suggestion for amending recommendation 1.

51. **Mr. Zanker** (Australia) endorsed the remarks of the United States representative on the value of the chapter, in view of the work that would have to be done in countries wishing to encourage private investment in infrastructure projects, in terms of reforming their domestic legislation to attract such investment. There was no harm in the Commission's pointing to the possible need for reform in areas such as intellectual property law, security interests, company law, accounting practices and even migration law.

52. He agreed that the title of the chapter needed to be changed, and he could accept the Canadian suggestion regarding recommendation 1.

53. **Mr. Maradiaga** (Honduras) said that his country, which was seeking aid after the disaster that had struck it, would find the guide, especially chapter VII, useful because it would help in efforts to provide legal certainty for foreign investors. The Commission was doing good work.

54. **Mr. Markus** (Observer for Switzerland) recognized that chapter VII was useful, but thought that it was rather ambitious and might be shortened.

55. The drafting of the heading above recommendation 1 could perhaps be improved. However, he could support the Canadian suggestion for amending the text of the recommendation.

56. **Mr. Wallace** (United States of America) thought that the title of recommendation 1 should be retained, but the text amended along the lines of the Canadian suggestion.

57. A reference in the notes to the need for due regard for the principle of freedom of contract would be helpful.

58. **Mr. Estrella Faria** (International Trade Law Branch) apologized for any confusion arising from the title of the chapter. In most cases, as was clear from paragraphs 3 to 5 of the notes, the laws of the host country would apply. It was not the Secretariat's intention to suggest that the agreement itself might be subject to foreign law.

59. The issue of conflict of law would only be relevant to contracts entered into between the concessionaire and other parties such as lenders; such contracts which would often in any case be subject to foreign law because entered into outside the host country. The issue, although peripheral, was discussed briefly in paragraphs 6 to 8 of the notes.

60. In recommendation 1 it had not been the intention to suggest that there should be an exhaustive list of all laws that might apply to the project agreement. Paragraph 5 of the notes spoke of texts that were "directly applicable". It might be appropriate, for example, for the legislative provisions to refer back to the general procurement regime.

61. With regard to statutory or regulatory texts whose application was excluded, he would give a relevant example. In a large transport project in Europe the concessionaire's entitlement to raise the level of tariffs had

been challenged in court by a private party invoking a provision of the country's civil code concerning prices for services. As a result, the entire financial arrangement for the project had had to be renegotiated because the tariff had been reduced to a level that even the contracting authority considered insufficient to allow repayment of the loan and recovery of the investment.

62. **Mr. Al-Nasser** (Observer for Saudi Arabia) said that chapter VII was ambitious but that that was not a flaw. The Secretariat was to be commended for its excellent work. The guide would help countries with limited legal expertise to enact up-to-date laws.

63. **Mr. Lalliot** (France) suggested that the title of the chapter might be changed to something like "Legal certainty required for the promotion of private investment in infrastructure".

64. **Mr. Meena** (India) suggested that relevant areas of legislation might include legislation on highways. In discussions on the privatization of highways in India, entrepreneurs had expressed concern that all powers governing traffic movement lay with government departments, whereas they needed certain powers to prevent overloading and resultant damage to the roads.

The meeting rose at 12.20 p.m.